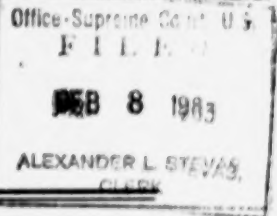


No. 82-1113



**In the Supreme Court of the United States**

OCTOBER TERM, 1982

DUNCANSON-HARRELSON COMPANY, ET AL., PETITIONERS

v.

DIRECTOR, OFFICE OF WORKERS' COMPENSATION  
PROGRAMS, DEPARTMENT OF LABOR, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO  
THE UNITED STATES COURT OF APPEALS FOR  
THE NINTH CIRCUIT

BRIEF FOR THE FEDERAL RESPONDENT

REX E. LEE  
*Solicitor General*  
*Department of Justice*  
*Washington, D.C. 20530*  
*(202) 633-2217*

T. TIMOTHY RYAN, JR.  
*Solicitor of Labor*

KAREN I. WARD  
*Associate Solicitor*

MARY-HELEN MAUTNER  
*Counsel for Appellate Litigation*

CHARLES I. HADDEN  
*Attorney*  
*Department of Labor*  
*Washington, D.C. 20210*

### **QUESTION PRESENTED**

**Whether employer contributions to a union pension trust fund are "wages" for purposes of computing compensation benefits under the Longshoremen's and Harbor Workers' Compensation Act, 33 U.S.C. (& Supp. V) 901 *et seq.***

## TABLE OF CONTENTS

	Page
Opinions below .....	1
Jurisdiction .....	1
Statement .....	2
Discussion .....	3
Conclusion .....	4

## TABLE OF AUTHORITIES

### Cases:

<i>Hilyer v. Morrison-Knudsen Construction Co.</i> , 670 F.2d 208, cert. granted, No. 81-1891 (Oct. 4, 1982) .....	3
<i>Morrison-Knudsen Construction Co. v. Director,</i> <i>OWCP</i> , cert. granted, No. 81-1891 (Oct. 4, 1982) .....	3, 4

### Statute:

Longshoremen's and Harbor Workers' Compensation Act, 33 U.S.C. 901 (& Supp. V) <i>et seq.</i> .....	2
33 U.S.C. 909(b) .....	2

# **In the Supreme Court of the United States**

OCTOBER TERM, 1982

---

No. 82-1113

DUNCANSON-HARRELSON COMPANY, ET AL., PETITIONERS

v.

DIRECTOR, OFFICE OF WORKERS' COMPENSATION  
PROGRAMS, DEPARTMENT OF LABOR, ET AL.

---

*ON PETITION FOR A WRIT OF CERTIORARI TO  
THE UNITED STATES COURT OF APPEALS FOR  
THE NINTH CIRCUIT*

---

**BRIEF FOR THE FEDERAL RESPONDENT**

---

## **OPINIONS BELOW**

The opinion of the court of appeals (Pet. App. 2a-18a) is reported at 686 F.2d 1336. The opinion of the Benefits Review Board (Pet. App. 19a-31a) is reported at 9 Ben. Rev. Bd. Serv. (MB) 888. The opinion of the administrative law judge (Pet. App. 32a-52a) is unreported.

## **JURISDICTION**

The judgment of the court of appeals was entered on September 14, 1982. A petition for rehearing was denied on November 12, 1982 (Pet. App. 1a). The petition for a writ of certiorari was filed on January 3, 1983. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

## STATEMENT

1. In May 1975, David W. Freer was fatally injured while working for petitioner Duncanson-Harrelson Co. as a pile driver on the expansion of oil tanker docking facilities in Pittsburg, California (Pet. App. 4a, 20a). Under the collective bargaining agreement in effect at the time, Duncanson-Harrelson was required to pay fixed sums of money into a pension trust fund for each hour worked by each employee (*id.* at 13a). These contributions were made directly to the trust funds, not to the individual employees (*ibid.*), and, by the terms of the agreement, they were "not [to] be considered as compensation" (see Pet. 3).

After Freer's death, his widow, respondent Nancy A. Freer, filed a claim for death benefits under the Longshoremen's and Harbor Workers' Compensation Act ("the LHWCA"), 33 U.S.C. (& Supp. V) 901 *et seq.* As part of her claim, respondent Freer contended that her husband's "average weekly wage," on which the amount of death benefits is based (see 33 U.S.C. 909(b)), should include, inter alia, petitioner Duncanson-Harrelson's contributions to the pension trust fund for the hours worked by Freer (see Pet. App. 4a, 13a).<sup>1</sup> The administrative law judge rejected her contention (*id.* at 48a-49a), and the Benefits Review Board affirmed that portion of his order (*id.* at 23a-24a). Citing its previous decisions on the question, the Board ruled that because "the employee has no entitlement" to benefits from a trust fund until the "occurrence of a future event that may or may not happen," such benefits are "too speculative to be included in a computation of one's average

---

<sup>1</sup>Notwithstanding the court of appeals' statement that respondent Freer sought inclusion of "contributions to the union pension and health funds" in her husband's average wage (Pet. App. 13a), it appears that she contended only that the pension fund payments should be included.

wage" (*id.* at 23a). The Board also noted that including trust fund benefits in the weekly wage figure "may result in the payment of excessive [LHWCA] benefits to the employee" (*ibid.*).

2. Relying primarily on *Hilyer v. Morrison-Knudsen Construction Co.*, 670 F.2d 208 (D.C. Cir. 1981), cert. granted, No. 81-1891 (Oct. 4, 1982), the court of appeals reversed (Pet. App. 13a-18a). The court concluded that the statutory definition of "wages" is flexible enough to include "the values received from the employer that are easily identifiable and calculable" (*id.* at 15a). It regarded the employer's contributions as " 'an important part of the employees' total compensation, and an equally important part of the employer's labor costs' " (*id.* at 16a, quoting *Hilyer, supra*, 670 F.2d at 212 n.7), even though the payments were made directly to the trust fund, not to the employees, and the individual workers exercised no control over the fund's day-to-day management (Pet. App. 16a). Accordingly, the court held that the trust fund contributions should be included as "wages" in computing the LHWCA compensation (*id.* at 17a-18a).

#### DISCUSSION

Petitioners contend (Pet. 6-18) that the court of appeals erroneously held that employer contributions to a pension trust fund are "wages" for purposes of computing compensation benefits under the LHWCA. This case therefore presents the same question now before this Court in *Morrison-Knudsen Construction Co. v. Director, OWCP*, cert. granted, No. 81-1891 (Oct. 4, 1982). For the reasons stated in our brief in that case, we agree with petitioners that the court below erred in its construction of the LHWCA. Because the resolution of this issue in *Morrison-Knudsen* will control the resolution of this case, the Court should hold this petition pending its decision in *Morrison-Knudsen*.

**CONCLUSION**

The petition for a writ of certiorari should be held pending the decision in *Morrison-Knudsen Construction Co. v. Director, OWCP, supra*, and should then be disposed of as appropriate in light of that decision.

Respectfully submitted.

REX E. LEE  
*Solicitor General*

T. TIMOTHY RYAN, JR.  
*Solicitor of Labor*

KAREN I. WARD  
*Associate Solicitor*

MARY-HELEN MAUTNER  
*Counsel for Appellate Litigation*

CHARLES I. HADDEN  
*Attorney*  
*Department of Labor*

FEBRUARY 1983